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May 7, 2020

Ms. Jenny Abbott Kitchings, Clerk  
South Carolina Court of Appeals  
1220 Senate Street  
P.O. Box 11629  
Columbia, SC 29211

RE: Michael and Nancy Halwig and Stephen and Beverly Noller v. Daufuskie  
Island Utility Company, Inc.  
Appellate Case No. 2019-001354  
SC Public Service Commission Docket No.: 2018-364-WS  
NMRS File Nos.: 54041/09000 and 055561/09000

Dear Ms. Kitchings:

Enclosed please find Appellants' Reply Brief to Initial Brief of Respondent Daufuskie Island Utility Company, Inc., and Appellants' Second Supplemental Designation of Matter in the above-referenced matter. By copy of this letter to counsel of record, we are serving them with a copy of the enclosed documents.

If you have any questions concerning this request, please give me a call at the telephone number listed above. I appreciate your assistance in this matter.

With best regards, I am

Very truly yours,

Newman Jackson Smith

NJS:jl  
Encls.

cc: Thomas Gressette, Esq. (w/encls.)  
Andrew M. Bateman, Esq. (w/encls.)  
Jeffrey M. Nelson, Esq. (w/encls.)  
Joseph M. Melchers, Esq. (w/encls.)  
Jocelyn Boyd, Clerk, Public Service Commission of SC (w/encls.) ✓

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2019-001354

Stephen and Beverly Noller and Michael and Nancy Halwig, .....Appellants,  
v.

Daufuskie Island Utility Company, Incorporated and South Carolina  
Office of Regulatory Staff, ..... Respondents.

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**APPELLANTS' REPLY BRIEF TO INITIAL BRIEF OF RESPONDENT  
DAUFUSKIE ISLAND UTILITY COMPANY, INC.**

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Appellants file this Reply Brief in opposition to the Initial Brief of Respondent Daufuskie Island Utility Company, Inc. (“DIUC”), which was filed on April 27, 2020.

1. Respondent DIUC mischaracterizes the Complaint as solely for monetary damages and fails to address the Commission’s regulatory duty to address the Customer Service Agreement and DIUC’s obligation to install facilities and equipment.

Like Respondent ORS, Respondent DIUC presents arguments in its Initial Brief based on its mischaracterization of Appellants’ request as solely for monetary damages and its position that the Public Service Commission (the “Commission”) does not have the authority to award monetary damages. These arguments merely assert without foundation that the Customer Service Agreement and Addendum to Customer Service Agreement (“Agreement” and “Addendum”) are private contracts and that the cost of the replacement water and sewer equipment extorted from Appellants was ‘damages’ under the contracts. As stated in Appellants’ Initial Brief and Appellants’ Reply to Respondent ORS’s Initial Brief, the Complaint requested appropriate relief from the Commission. The Complaint requested reimbursement of replacement water and sewer lines and equipment installation costs and any further or other relief the Commission may grant. See Complaint p. 1 and Cont. of Complaint p. 5; Complainants’ Response to the Brief on Jurisdictional Matters by Respondent, p. 2. Counsel for Appellants explained the relief requested by Appellants in the Oral Argument before the Commission on March 20, 2019. See Transcript of Oral Argument, Hearing #19-11763, March 20, 2019. Appellants specifically sought that the Commission hold that the Customer Service Agreement was in violation of the Commission’s regulations. Tr. at 8:15-9:1, 12:14-17, 13:14-23, 18:8-19:15; see also Complainants’ Brief Confirming Jurisdiction filed with the Commission prior to the Oral Argument, at p. 6; Complainants’ Petition for Rehearing or Reconsideration, p. 3.

Respondent DIUC's argument fails to explain why the Commission does not have jurisdiction under its own regulations over the Agreement and Addendum. Respondent DIUC's arguments fail to explain why the Commission does not have jurisdiction where ORS and the Commission failed to review and approve the Customer Service Agreement prior to its execution in violation of the clear language of the statute and regulations. See SC Code Reg. 103-541 and -743. Respondent DIUC's argument fails to explain why the Commission does not have jurisdiction where DIUC failed to install water and sewer replacement lines and equipment in violation of state regulations. See S.C. Code Reg. 103-740 and -540. The Commission should have taken jurisdiction to review both of these violations of its own regulations. The Commission should have reviewed the failure to review and act on the Customer Service Agreement and its impact on the Appellants, as well as on its own rate setting authority. The Addendum proffered by Respondent DIUC to foreclose Appellants from ever taking legal action against it was also not submitted for review and approval to the Commission or the ORS as required.

The Commission should have reviewed DIUC's failure to install the facilities and equipment necessary to supply utility services to Appellants' properties when its equipment was damaged by Hurricane Matthew in conjunction with the review of the Agreement and Addendum under its own regulations. Respondent DIUC's arguments do not explain why the Commission does not have jurisdiction over its actions as a public utility. Respondent DIUC's arguments do not overcome the fact that the substantial rights of the Appellants have been prejudiced because the Commission's findings and conclusions are in violation of statutory provisions, clearly erroneous and arbitrary or capricious.

Respondent DIUC's reliance on Lindler v. Baker, 280 S.C. 130, 311 S.E.2d 99 (Ct. App. 1984) is wholly misplaced. That case and cases cited therein are not about agreements subject

to SC Code Reg. 103-541 or -743 but to SC Code Reg. 103-503 regarding rate agreements. The agreements at issue there and cases cited therein were not about replacement equipment installed at customer cost but about terms affecting service connection or other fees and the payment or non-payment of them involving third parties.

There is no question the Commission has jurisdiction to review the Agreement and Addendum at issue as its own regulations require that it review and approve such agreements. SC Code Reg. 103-541 and -743. Respondent DIUC's argument that the Commission's enabling act does not provide for the regulation of the Agreement or Addendum fails in light of the Commission's own regulation requiring such agreements to be submitted for its review. Respondent DIUC fails to explain how these regulated agreements are private contracts or that the requirement for Appellants to pay for the replacement water and sewer equipment in order to restore utility service is outside of the Commission's jurisdiction. The terms of S.C. Code Ann. § 58-3-140(A) clearly empower the Commission with jurisdiction to review the "practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State."

Appellants maintain that the Commission has the authority to require DIUC to reimburse Appellants directly or in the form of abatement of future rates due to the violation of state law by DIUC. Even if the Commission disagreed, the Commission was legally required to have reviewed Appellants claim that the Agreement was therefore illegal and void as a result of DIUC's violation of the relevant regulations. Respondent DIUC's failure to provide the replacement equipment forced Appellants to act or continue to suffer the loss of use of their homes. The utility's requirement that such costs be paid by Appellants in the after the fact agreements without compliance with the regulations requiring Commission approval does not make the agreements a "private contractual matter", but a non-compliant and illegal agreements

subject to the Commission's jurisdiction. To send Appellants to another legal forum without any review or record on the essential issue of compliance with the applicable state statutes and regulations leaves nothing for this or another Court to review<sup>1</sup>.

Appellants hereby refer to and incorporate all arguments in their Appellants' Reply Brief to Initial Brief of Respondent South Carolina Office of Regulatory Staff, the Complainants' Brief Confirming Jurisdiction (before the Commission), Complainants' Response to the Brief on Jurisdictional Matters by Respondent (before the Commission), and Complainants' Petition for Rehearing or Reconsideration (before the Commission).

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<sup>1</sup> "Administrative agencies are afforded wide latitude in making decisions, as shown in the deferential standard of appellate review. However, the writing of orders without sufficient detail or analysis, coupled with this standard of review, can make their decisions as a practical matter unassailable on appeal." *Heater of Seabrook, Inc. v. Public Service Com'n of South Carolina*, 332 S.C. 20, 503 S.E.2d 739 (1998), p. 27, 742. *See also* S.C. Code Ann. 58-3-250. Final orders and decisions; contents; service on parties. (A) All final orders and decisions of the commission must be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings ...."



## CONCLUSION

The Commission erred in denying jurisdiction in this matter where Respondent DIUC failed to submit the Customer Service Agreement and Addendum to the ORS and the Commission for review and approval in violation of state regulations, where the ORS and the Commission failed to review and act on the Customer Service Agreement and Addendum, where the Commission allowed Respondent DIUC in effect to make a decision on its own rates concerning the requirement that Appellants pay the cost of the replacement water and sewer equipment (including the new federal tax), and where Respondent DIUC forced customers either to install replacement facilities and equipment at their own expense in violation of the state regulations, or to continue to lose the use of their homes. For the reasons set forth above and in Appellants' Initial Brief and Appellants' Reply to Respondent ORS's Initial Brief and other Briefs cited hereinabove, Appellants request that this Court reverse the denial of jurisdiction of the Commission in this matter and direct such other relief as is just and proper.

Respectfully submitted,

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SECOND SUPPLEMENTAL DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants proposes the following also be included in the Record on Appeal:

1. Complainants' Petition for Rehearing or Reconsideration filed June 21, 2019;
2. Complainants' Response to the Brief on Jurisdictional Matters by Respondent filed March 13, 2019.

I certify that this Designation contains no matter which is irrelevant to this appeal.

May 7, 2020

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**PROOF OF SERVICE**

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants Stephen and Beverly Noller and Michael and Nancy Halwig, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:           **Appellants' Reply Brief to Initial Brief of Respondent  
Daufuskie Island Utility Company, Inc.  
South Carolina Office of Regulatory Staff  
  
Second Supplemental Designation of Matter to be  
included in the Record on Appeal**

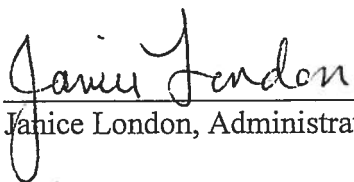
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Janice London, Administrative Assistant

May 7 2020